IN THE

Supreme Court of the United States

No. 675

October Term, 1928

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY E. DAVIS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO,

Appellants,

vs.

THE PROVIDENCE MILL COMPANY,

Appellee.

On Appeal From the District Court of the United States, Southern District of Ohio, Eastern Division

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MOTION OF APPELLANTS TO ADVANCE

GILBERT BETTMAN, Columbus, Ohio,
Attorney General of Ohio,
L. F. LAYLIN, Columbus, Ohio,
JOSEPH A. GODOWN, Columbus, Ohio,
Solicitors for Harry J. Kirk.
LEROY W. HUNT, Toledo, Ohio,
Prosecuting Attorney, Lucas County,
Solicitor for Lucas County Commissioners

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Appellants,

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Appellee.

MOTION OF APPELLANTS TO ADVANCE

Now come the appellants in the above entitled cause and move that this case be advanced for an early hearing.

In support of their motion appellants make a brief statement of the matter involved and the reasons relied upon for the advancement of the hearing of this cause.

STATEMENT OF MATTER INVOLVED

This cause is here on appeal from a decree of the District Court (three judges sitting) of the United States for the Southern District of Ohio by which appellant Kirk, an officer of the State of Ohio, was enjoined from draining the water from a portion of the Miami and Erie Canal in pursuance of Sections 14178 to 14178-12 inclusive, of the General Code of Ohio, enacted May 11, 1927, 112 Ohio Laws 360-363, on the ground that the performance by him of said duties was the taking of property of the appellee without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States, and impaired obligations under certain leases and agreements of the State of Ohio leasing to the appellee water used by appellee for hydraulic power and an agreement resulting from the covenants of a deed from the State of Ohio to the City of Toledo conveying to it a part of the Miami and Erie Canal northerly of that part abandoned by the Act of May 11, 1927, in which deed it was agreed that the City of Toledo should compensate appellee for its rights under its leases if the City of Toledo should deprive the appellee thereof, by virtue of the Act of the General Assembly of Ohio, authorizing the execution of said deed enacted January 23d, 1920. Like injunction against other appellants was ordered by the decree of the District Court. The aforesaid Act of the General Assembly of Ohio, of

May 11, 1927, declared that said canal be abandoned, that all leases for canal or hydraulic purpose be null and void sixty days after the passage of the Act, and directed the Director of Highways of the State (appellant Kirk) to drain the water from the abandoned portion of the canal and to prevent the water of the Maumee River from flowing into or through the abandoned part of the canal; by virtue of Sections 2 and 3 of the aforesaid Act the State of Ohio reserved unto itself all title to lands and waters which at the time of the passage of the Act were the property of the State of Ohio occupied by any part of the Miami and Erie Canal, which further provided that the same should forever be held by the State of Ohio in fee simple, and held for the purpose of constructing upon said lands a highway.

Appellants contend that the aforesaid Act of the General Assembly of May 11, 1927, is valid, does not deprive the appellee of its property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution, and that said Act does not impair the obligations of any agreements of the State of Ohio, in violation of the Constitution of the United States, relying upon the principle: that statutes of the State of Ohio authorizing the execution of said leases provided for certain conditions which for many years have been interpreted to mean that in leasing the surplus waters of the canals of the state there was a reservation of the right to resume the privilege of the use of the water whenever the state deemed it necessary for navigation purposes; that a subsequent statute granting a part of the canal for a public highway amounted to a rescission of the lease; that such steps

did not deprive the lessee of any rights without due process and without just compensation and are not void under the Constitution of the United States; and further that every lessee of power take his lease and put up his improvements with full notice of the reserved right on the part of the state to discontinue its canal and stop his supply of water.

Fox vs. Cincinnati, 104 U. S. 783, affirming
Fox vs. Cincinnati, 33 O. S. 492.
Hubbard vs. Toledo, 21 O. S. 379.
Elevator Co. vs. Cincinnati, 30 O. S. 629.
Voight vs. Railroad Co., 58 O. S. 123.

REASONS RELIED ON FOR ADVANCEMENT

The questions of law applicable to this case are substantially the same as the questions of law in the case of *Kirk et al. vs. Maumee Valley Electric Company*, Number 674 on the docket of this court, which cause and the case at bar can be argued together.

The injunction against Kirk as an officer of the state has the effect of enjoining the state; therefore, in view of the provisions of Section 949 of the Revised Statutes of the United States the appellant, Kirk, is entitled to the advancement of the hearing in this cause. Section 949 provides as follows:

> "When a state is a party, * * * in any suit in a court of the United States, such state * * * shall be entitled, on showing sufficient reason, to have the cause heard any time after it is docketed, in preference to any civil cause pending in such court between private parties."

It is manifest that the State of Ohio is the real party to this cause even though Harry J. Kirk, as superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, is the appellant, for the State of Ohio is *ex cathedra* through such officer enjoined from carrying out the provisions of the aforesaid Act of the General Assembly. That this is in effect a suit against the state is shown by a recent decision of this court in the case of *State Highway Commission of Wyoming vs. Utah Construction Company*, decided January 2, 1929, and found in the Advance Sheets of the Official Reports of this court including decisions from December 11, 1928, to January 2, 1929, in which the first headnote is:

> "Suit against the State Highway Commission and its members on a road construction contract executed in the name and on behalf of the state, held in effect a suit against the state."

As is readily seen from the foregoing statement, the State of Ohio, if the contention of appellants is correct, is needlessly required to supply water to the abandoned portion of the Miami & Erie Canal, which necessarily works an unwarranted inconvenience and expense, together with a responsibility, upon the State of Ohio.

Brief of appellants is in course of preparation and subject to completion of the printed record it is confidently hoped by counsel that it will be filed before the submission of this motion.

CONCLUSION

According to the information of counsel, if this cause is not advanced the same will not be reached for

argument until October of 1929. We therefore, in conclusion, desire to urge the court to assign this cause for hearing prior to the summer recess of the court.

Respectfully submitted,

GILBERT BETTMAN,
Attorney General of Ohio.
L. F. LAYLIN,
JOSEPH A. GODOWN,
Solicitors for Harry J. Kirk.
LEROY W. HUNT,
Prosecuting Attorney, Lucas County,
Solicitor for Lucas County Commissioners.